

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. G905704**

**TANESIA ROSS, EMPLOYEE**

**CLAIMANT**

**SODEXO, INC.,  
EMPLOYER**

**RESPONDENT**

**XL INS. AMERICA,  
CARRIER**

**RESPONDENT**

**OPINION FILED AUGUST 9, 2021**

Hearing before Administrative Law Judge O. Milton Fine II on August 6, 2021, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*.

Respondents represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

**I. BACKGROUND**

This matter comes before the Commission on a motion to dismiss by Respondents. A hearing on the motion was conducted on August 6, 2021, in Jonesboro, Arkansas. Claimant, who is representing herself, appeared in person and testified. In addition to Claimant's testimony, the record consists of the Commission's file—which, without objection, has been incorporated herein in its entirety by reference; and Respondents' Exhibit 1, documents related to the claim, consisting of one (1) index page and nine (9) numbered pages thereafter.

The record reflects the following procedural history. Claimant, through then-counsel Laura Beth York, filed a Form AR-C on September 3, 2019. Therein, she requested the full range of initial and additional benefits and alleged that she

sustained compensable injuries to “her back, knee, and other whole body” when she fell at work on April 1, 2019. On October 2, 2020, the first hearing was held on this claim before then-Chief Administrative Law Judge Barbara Webb. Judge Webb’s December 31, 2020, opinion contains the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed at all times pertinent hereto, including April 1, 2019, when Claimant sustained a compensable injury her left knee and right ankle.
3. Respondents accepted the claim as a medical-only claim.
4. Claimant earned an average weekly wage of \$200.61, which would entitle her to weekly compensation benefits of \$134.00 for temporary total disability benefits and \$134.00 for permanent partial disability benefits.
5. Claimant stipulates to the authenticity of all medical records and/or bills.
6. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable work-related injury to her back on April 1, 2019.
7. Claimant has failed to prove that she is entitled to temporary total disability benefits and/or additional medical treatment.
8. Claimant has failed to prove that she is entitled to an attorney’s fee herein.
9. All other issues, including entitlement to permanent partial and total disability payments, are reserved.

On January 5, 2021, Claimant—through then-counsel Laura Beth York—filed a notice of appeal. But that same day, York moved to withdraw from the case. On January 21, 2021, the Full Commission granted this motion under AWCC Advisory 2003-2. Claimant, now *pro se*, did not file an appellate brief. On May 4, 2021, the Full Commission issued an opinion affirming and adopting Judge Webb’s decision. *Tanesia Ross-Perkins v. Sodexo, Inc.*, AWCC No. G905704 (Full Commission Opinion filed May 4, 2021)(unpublished). That decision is thus binding on this proceeding under the Law of the Case Doctrine and is *res judicata*. See *Thurman v. Clarke Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

The record reflects that no further action was taken on this case until June 9, 2021. On that date, Respondents filed the instant motion to dismiss. The file was assigned to me on June 10, 2021. My office wrote Claimant the next day, asking for a response to the motion to dismiss within twenty (20) days. The correspondence was sent by certified and first-class mail to the address that Claimant confirmed in her testimony as being correct. The certified letter was signed for on June 14, 2021, and the first-class letter was not returned. In her testimony, Claimant denied ever receiving this correspondence, explaining that “[s]ometime[s] our mailman put[s] other people[’e] mail in other boxes.” Regardless, no response from her to the motion to dismiss was forthcoming.

On July 6, 2021, I scheduled a hearing on the motion to dismiss for August 6, 2021, at 10:00 a.m. at the Craighead County Courthouse in Jonesboro. The hearing notice was sent to Claimant via certified and first-class mail at the same address as before. The certified letter was signed for on July 9, 2021—with the same signature as the June 11, 2021, correspondence, and the first-class mail was not returned. Claimant’s testimony was that while she did not sign for or receive the certified letter, the first-class correspondence reached her in this instance.

The hearing on the motion to dismiss proceeded as scheduled on August 6, 2021. Claimant appeared at the hearing and objected to dismissal of her claim. Respondents appeared through counsel and argued for dismissal under AWCC R. 099.13.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include documents and other matters properly before the Commission, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers’ Compensation Commission has jurisdiction over this claim.
2. All parties received notice of the motion to dismiss and the hearing thereon pursuant to AWCC R. 099.13.

3. The Commission is authorized to dismiss claims lacking a justiciable issue pursuant to AWCC R. 099.13.
4. This claim should be, and hereby is, dismissed *without prejudice* pursuant to AWCC R. 099.13.

### **III. DISCUSSION**

AWCC R. 099.13 reads:

Upon meritorious application to the Commission from either party in an action pending before the Commission, requesting that the claim be dismissed for want of prosecution, the Commission may, upon reasonable notice to all parties, enter an order dismissing the claim for want of prosecution.

*See generally Johnson v. Triple T Foods*, 55 Ark. App. 83, 85, 929 S.W.2d 730 (1996).

As the moving party, Respondents under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012) must prove their entitlement to the relief requested—dismissal of the instant claim—by a preponderance of the evidence. This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are

solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

At the hearing, Claimant objected to dismissal of her claim. She testified that in the event that it is not dismissed, she would like a hearing on the issue of her entitlement to benefits “[t]o compensate [her] when [she] wasn’t working from the injury”; *i.e.*, temporary total disability benefits. But as shown above, this was already decided against her in the previous litigation. She cannot raise it anew. Claimant has given no indication that she intends to pursue permanent partial, permanent total, and/or wage loss disability benefits, notwithstanding the fact that Judge Webb expressly reserved those issues in her opinion.

The Arkansas Court of Appeals in *Johnson, supra*, held that a claim may be dismissed for lack of prosecution based on the fact that there is no justiciable issue. The authority for doing so comes under Rule 13, which the Commission promulgated under Ark. Code Ann. § 11-9-205(a)(1)(A) (Repl. 2012), which authorizes it “[t]o make such rules and regulations as may be found necessary[.]” *See Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969);

*Johnson, supra.* The evidence shows that this claim should be dismissed under Rule 13 for lack of a justiciable issue.

That, however, leaves the question of whether the dismissal should be with or without prejudice. The Commission possesses the authority to dismiss claims with prejudice. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988). This includes claims dismissed under Rule 13. *Johnson, supra.* In *Abo v. Kawneer Co.*, 2005 AWCC 226, Claim No. F404774 (Full Commission Opinion filed November 15, 2005), the Commission wrote: “In numerous past decisions, this Commission and the Appellate Courts have expressed a preference for dismissals without prejudice.” (citing *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982); *Hutchinson v. North Arkansas Foundry*, Claim No. D902143 (Full Commission Opinion filed October 23, 1991)). Respondents at the hearing asked for a dismissal without prejudice. Based on the above authorities, I agree and find that the dismissal of this claim should be and hereby is entered *without prejudice*.<sup>1</sup>

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<sup>1</sup>“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5<sup>th</sup> ed. 1983).

**IV. CONCLUSION**

Based on the findings of fact and conclusions of law set forth above, Respondents' motion to dismiss is granted. This claim is hereby dismissed without prejudice.

**IT IS SO ORDERED.**

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O. MILTON FINE II  
Chief Administrative Law Judge